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Ontario Court of Appeal: Statutory Claim for Damages for Cost of Remediation Not Precluded by Ministry Order for Remediation

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The Ontario Court of Appeal has ruled in Midwest Properties Ltd. v Thordarson (2015) ONCA 819 that the possibility of double recovery should not prevent an award for damages for the remediation of contaminated property under s.99(2) of the Environmental Protection Act R.S.O. 1990, c. E.19 (EPA), when the Ministry of Environment and Climate Change (MOECC) has already ordered the remediation of the property. The defendants had stored large volumes of waste petroleum hydrocarbons (PHC's) on their property for several decades. The hydrocarbons had contaminated the soil and groundwater on their property as a result of their storage practices. They were in almost constant breach of the Ministry license and/or compliance orders for a period of 23 years. Groundwater flows from their property had contaminated Midwest's property. Midwest sued under s. 99(2) of the EPA, nuisance and negligence. The trial judge held that the defendants weren't liable under any of these causes of action. In addition to refusing to hold the defendants liable under s.99(2) EPA, the trial judge held that they could not be liable in nuisance or negligence because Midwest had not proven that the contamination had lowered the value of its property.

The Court of Appeal overturned the trial judge's decision, ordering the corporate principal ,Thordarson and the corporation Thorco Contracting Ltd. jointly and severally liable for $1,328,000 in damages under s.99 of the EPA. Further, finding the defendants liable in nuisance and negligence, the Appeal Court awarded $50,000 in punitive damages against each of the defendants. With respect to liability under s.99(2) the Court stated that "the purposes of the EPA would be frustrated if a defendant could use an MOE order as a shield. Such an interpretation would also discourage civil proceedings and may even discourage MOE officials from issuing remediation orders for fear of blocking a civil suit." (at par.49)

On the issue of damages, the Court of Appeal held that under s.99 EPA, polluters must reimburse aggrieved parties not only for the diminution in the value of the property but also for the costs incurred in remediating contamination. Further, damages were not limited to the level of contamination which occurred after property was purchased. "The (defendants)should not be able to use their lengthy history of pollution and non-compliance as a shield to limit the amount of damages they now owe." (at par. 79) The Court also determined that Midwest had proven damages sufficient to support the causes of action in nuisance and negligence. While witnesses for the plaintiff were not professional appraisers, they were experts in the environmental assessment of realty. They had testified that the PHC contamination would lower the value of the property and/or make it more difficult to obtain financing. "They had expert knowledge of the relationship between particular contaminants and their general effect on property values. While the experts did not quantify the loss, quantification of damages is not required to establish that Midwest has suffered damage compensable under the law of nuisance and negligence." (at par. 99) The PHC's were volatile and constituted a risk to human health and the environment. Soil and groundwater testing were above MOECC limits and testimony established that the PHC's would get into Midwest's building and pose a health risk to its occupants. This was evidence of material harm or injury to property. (at par.101).

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